UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CHARLIE T. DANG,

Plaintiff,

vs.

SOLAR TURBINES, INC., a Caterpillar Company,

Defendant.

CASE NO. 07cv520 BTM (POR)

ORDER:
(1)GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS [Doc. No. 10];

(2) DENYING DEFENDANT'S MOTION FOR A MORE DEFINITE STATEMENT [Doc. No. 10];

(3) DENYING PLAINTIFF'S MOTION TO QUASH FURTHER MOTIONS [Doc. No. 16];

(4) DENYING PLAINTIFF'S MOTION TO DISBAR WILLIAM WHELAN [Doc. No. 16];

(5) DENYING PLAINTIFF'S MOTION TO QUALIFY WILLIAM WHELAN AS CO-DEFENDANT [Doc. No. 16]; AND

(6) DENYING PLAINTIFF'S AMENDED MOTION FOR SANCTIONS [Doc. No. 19].

On March 22, 2007, Plaintiff Charlie T. Dang, proceeding pro se, filed an employment discrimination complaint against his employer, Defendant Solar Turbines, Inc. On April 19, 2007, Defendant filed a motion to dismiss, or in the alternative, a motion for a more definite statement. On July 3, 2007, the Court granted a motion for a more definite statement and ordered the Plaintiff to amend his complaint.

Plaintiff filed his First Amended Complaint (FAC) on July 24, 2007 setting forth the following ten causes of action in the caption: (1) Disability Discrimination; (2) Malicious Practices of Employment; (3) Intentional Employment Discrimination; (4) Intentional Infliction of Physical and Emotional Distress; (5) Sexual Harassment; (6) Retaliation in Employment; (7) Racial Discrimination; (8) Age Discrimination in Employment; (9) Failure to Reasonable Accommodations [sic]; (10) Front Pay Discrimination in Employment. In the body of the FAC, Plaintiff further stated that he alleges causes of action "under and pursuant to" the Family Medical Leave Act; the Americans with Disabilities Act; Title VII of the Civil Rights Act; Age Discrimination in Employment Act; California Fair Employment and Housing Act; and the California Family Rights Act.

On August 10, 2007, Defendant filed a motion to dismiss Plaintiff's FAC, or in the alternative, a motion for a more definite statement. On October 10, 2007, Plaintiff filed (1) a motion to quash Defendant's further motions to dismiss Plaintiff's complaint; (2) a motion to disbar attorney William V. Whelan; and (3) a motion to qualify Mr. Whelan as a co-defendant. On October 29, 2007, Plaintiff filed what he called "Amended Motions for Sanctions" requesting that the court award sanctions in addition to the above requested relief.

For the reasons discussed below, the Court GRANTS IN PART AND DENIES IN PART Defendant's motion to dismiss and DENIES Defendant's motion for a more definite statement. The Court DENIES Plaintiff's motions to quash further motions, to disbar Mr. Whelan, and qualify Mr. Whelan as a co-defendant. The Court further DENIES Plaintiff's amended motion for sanctions.

BACKGROUND

The following facts are taken from Plaintiff's FAC. The Court makes no finding as to the truth of these facts.

Plaintiff began working for Defendant Solar Turbines on July 1, 1991. (FAC, p.2) Plaintiff performed well and received merit increases every year until 2000. (Id.) Starting in early 2000, Plaintiff began suffering from "permanent left leg coldness" and resulting numbness in the leg and severe hemorrhoids. (FAC 1) As a result of this condition, Plaintiff was "prevented from standing or walking for 10-15 minutes at a time." (Id.)

Around the same time, Plaintiff's Manager Sharlene Mullen began "scapegoating" Plaintiff as a poor performer, despite his good performance. (Id.) Mullen did so in order to prove to her superiors that she "was serious about dealing with poor performance in her department." (FAC 2, Ex. D) Mullen targeted Plaintiff by forcing Plaintiff to work on the shop floor and to participate in a training class which he did not need and asking his co-workers to "write up against" him. (Id.) Mullen chose Dang to scapegoat because he was "known as a submissive guy." (Id.) Plaintiff alleges that Mullen's treatment of him constitutes sexual harassment and a hostile working environment. (FAC 1)

On September 18, 2003, Scott Jaykell, Human Resources, met with Plaintiff to discuss Plaintiff's alleged poor performance. (FAC 4) During this discussion, Jaykell discovered that Plaintiff was suffering from depression and placed Dang on a disability leave under FMLA beginning on September 19, 2003. (FAC 4, 5) Around this time, Dr. Rosben Gutierrez, Plaintiff's psychiatrist, diagnosed him with severe depression. (FAC 7)

On October 20, 2003, Plaintiff wrote a letter to Scott Jaykell complaining about the unfair treatment he received from Mullen. (Ex. D)

On October 28, 2003, Dr. Gutierrez cleared Plaintiff to return to work starting November 19, 2003 and recommended a transfer to a different department. (FAC 9, Ex. G) On November 12, 2003, Dr. Eric Stueland also wrote to Defendant recommending that Plaintiff be transferred to a different department. (FAC 10) On November 11, 2003, Solar informed Plaintiff that Solar had reviewed the current job openings and there was no position available in a different department with similar job duties. (Ex. F) On November 19, 2003,

because Plaintiff had not been allowed to return to work, Dr. Gutierrez extended Plaintiff's disability leave to January 14, 2004. (FAC 11)

On November 20, 2003, Defendant sent Plaintiff a letter requesting that Plaintiff see Dr. Davis Suskind on December 1, 2003 for a fitness-for-duty clearance. (FAC 13, Ex. L) Dr. Suskind found Plaintiff unfit to return to work. (FAC 13) On January 2, 2004, Plaintiff was again examined by another physician, Dr. Charles Ettari, at the request of Defendant. (FAC 14) Plaintiff alleges that Defendant used these medical opinions to refuse to allow Plaintiff to return to work for malicious and discriminatory reasons. (FAC 14,15)

On or around January 12, 2004, Plaintiff was placed on long-term disability status by Defendant. (FAC 16) On February 24, 2004, Dr. Gutierrez again released Dang to return to work and recommended transfer to a different department. (FAC 17) On March 19, 2004, Defendant wrote to Dr. Gutierrez requesting that Dr. Gutierrez reevaluate Plaintiff's ability to return to work given that he would return to a Performance Improvement Plan. (Ex. F-F) Defendant apparently continued Defendant's long term disability status. On December 15, 2004, Dr. Gutierrez continued Plaintiff's disability status to March 1, 2005, finding him temporarily totally disabled. (Ex. M)

On March 9, 2006, Dr. Gutierrez found Plaintiff no longer disabled and recommended that he be returned to work for a fitness-for-duty evaluation. (FAC 20, Ex. K) On March 27, 2006, Defendant also cleared Plaintiff for a return to work with some limitations, i.e., sedentary work only and unable to return to his previous job. (FAC 20, Ex. Y) Instead of immediately reinstating Plaintiff, Defendant invited Plaintiff to return to Solar on April 14, 2006 to apply for open positions. (FAC 23) Plaintiff picked one of the open positions. Plaintiff was informed two weeks later by Scott Jaykelll that he was not qualified for the chosen position. (Id.) On May 11, 2006, Plaintiff returned to Solar again to examine the list of openings. At this time, Jaykell offered Plaintiff a severance package in exchange for resignation and also threatened to terminate him if he did not resign. (FAC 24) On May 24, 2006, Jaykell informed Plaintiff that he was not qualified for the position that he had picked on May 11, 2006.

Plaintiff alleges that Solar's repeated failure to accommodate him by reinstating him to a similar position in a different department constitutes discrimination and retaliation for taking a medical leave of absence. (FAC 22) Plaintiff further alleges that Defendant's actions are attributable to "racial discrimination against Dang because he is not an Anglo-American" and also "age discrimination . . . because he is over 40." (FAC 31, 39)

DISCUSSION

A motion to dismiss for failure to state a claim will be denied unless it appears that "no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Fidelity Financial Corp. v. Federal Home Loan Bank of San Francisco, 792 F.2d 1432, 1435 (9th Cir. 1986) "The court may dismiss a complaint as a matter of law for (1) lack of a cognizable legal theory or (2) insufficient facts under a cognizable legal claim." Smilecare Dental Group v. Delta Dental Plan of California, Inc., 88 F.3d 780, 783 (9th Cir1996) quoting Robertson v. Dean Winter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir.1984). Although the Court is generally confined to consideration of the pleadings only, attached documents are deemed part of the complaint and may be considered in deciding a motion to dismiss. Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987).

1. FMLA/CFRA Claims

Plaintiff's FAC alleges violations of the Family Medical Leave Act, 29 U.S.C. 2601 *et. seq.* (FMLA) and the California Family Rights Act, California Government Code Sections 12945.2 (CFRA). FMLA and CFRA permit eligible employees to take up to twelve weeks of leave during any twelve-month period in the event of a serious health condition. Upon return from a FMLA/CFRA leave, an employee is entitled either to be reinstated to his or her former position or placed in an equivalent position in terms of benefits, pay and other conditions of employment. 29 U.S.C.A. § 2614(a)(1); Cal. Gov't Code Section 12945.2(a). FMLA/CFRA further prohibits an employer from interfering with an employee's exercise of his or her rights under these provisions and retaliating based on an exercise of these rights.

29 U.S.C.A. § 2615(a); Cal. Gov't Code 12945.2(l).

Defendant argues that the Court should dismiss Plaintiff's FMLA and CFRA claims because Plaintiff is only guaranteed reinstatement during the twelve-week period allotted by FMLA/CFRA and Plaintiff did not return to work until a much later date. Plaintiff however appears to be challenging more than just the failure to reinstate; he also alleges that Defendant's failure to reinstate him in March of 2006 was in retaliation for taking an earlier FMLA/CFRA leave of absence. (FAC 22) Therefore, contrary to Defendant's contention, it is not apparent from Plaintiff's current pleadings that Plaintiff can plead no facts which would entitle him to relief under FMLA/CFRA. If Plaintiff can establish evidence of a causal connection between his earlier FMLA/CFRA leave and Defendant's subsequent refusal to reinstate him after his long-term leave, Plaintiff may be entitled to relief for retaliation under these statutes. See 29 U.S.C.A. § 2615(a)(2); Govt. Code 12940(h); 12945.2(l) (prohibiting employer retaliation for exercise of leave rights). The Court therefore denies Defendant's motion to dismiss Plaintiff's FMLA/CFRA claims.

Although Plaintiff's FAC is not a model of clarity, the Court takes in to account the fact that Plaintiff is proceeding pro se. The Court finds that Plaintiff has met the requisite minimum threshold of giving the Defendant fair notice of Plaintiff's FMLA/CFRA claims and the factual basis for these claims. Yamaguchi v. United States Department of the Airborne, 109 F.3d 1475, 1481 (1997). The Court therefore denies Defendant's motion for a more definite statement with regard to the CFRA/FMLA claims.

2. Disability Discrimination Claims

Plaintiff also alleges that Defendant discriminated against him based on his disability and failed to provide him with reasonable accommodations pursuant to the Americans With Disabilities Act, 42 U.S.C. sections 12101 et. seq. (ADA) and the California Fair Employment and Housing Act, California Government Code section 12940 (FEHA). Plaintiff's disability claims appear to boil down to the contention that Defendant repeatedly refused to reinstate Plaintiff after his leave and allow him to transfer to a different but similar job upon his return.

The ADA prohibits an employer from discriminating "against a qualified individual with a disability because of the disability." 42 U.S.C. Section 12112(a). A qualified individual is a person who is able to perform the essential functions of the job with or without reasonable accommodation. 42 U.S.C. Section 12111(8); Kennedy v. Applause, 90 F.3d 1477, 1481 (9th Cir. 1996). FEHA also contains similar provisions prohibiting discrimination against disabled individuals who are able to perform the "essential duties" of the job. Cal. Govt. Code Section 12940(a).

Defendant contends that Plaintiff's disability claims should be dismissed because Plaintiff admits in his FAC that he was "temporarily totally disabled" during his leave. Defendant argues that because Plaintiff was unable to perform the essential functions of his job, Plaintiff was therefore not a "qualified individual" and ineligible for protection under the ADA and FEHA. The Ninth Circuit considered and rejected a similar argument in Nunez v. Wal-Mart, 164 F.3d 1243, 1247 (9th Cir. 1999) as follows :

> Unpaid medical leave may be a reasonable accommodation under the ADA. . .. Even an extended medical leave, or an extension of an existing leave period, may be a reasonable accommodation if it does not pose an undue hardship on the employer . . .." If [Plaintiff's] medical leave was a reasonable accommodation, then [his] inability to work during the leave period would not automatically render [him] unqualified. . . . Determining whether a proposed accommodation (medical leave in this case) is reasonable, including whether it imposes an undue hardship on the employer, requires a fact-specific, individualized inquiry." (citations omitted)

The Court likewise rejects Defendant's argument. As the Ninth Circuit held, Plaintiff's inability to work during the leave period does not exclude him from relief under the ADA and FHA as long as Plaintiff can establish that his leave was a reasonable accommodation. Whether reinstatement and transfer to a different position after the long term leave enjoyed by Plaintiff constitutes a reasonable accommodation will be a factual question. At this point, Plaintiff has pled that he was cleared to return to work from his long term leave on March 27, 2006 with certain restrictions and that Defendant failed to reinstate him in a position that would accommodate those restrictions in contravention of the ADA and FEHA. (FAC 20-22) Plaintiff has also pled that his reinstatement and transfer to a different department would not have been an undue hardship on Defendant. (FAC 21) The Court finds that these allegations in

addition to Plaintiff's factual allegations regarding his medical history and leave are sufficient to state a claim for relief. Plaintiff's pleadings with regard to his disability claims are also sufficient to provide Defendant with notice regarding the factual basis for Plaintiff's claims.[1] The Court therefore denies Defendant's motion to dismiss and motion for a more definite statement with regard to Plaintiff's disability claims.

3. Race Discrimination and Age Discrimination Claims

Plaintiff's FAC also alleges race and age discrimination claims pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. sections 2000-e, et. seq. (Title VII), the Age Discrimination and Employment Act, 29 U.S.C. sections 621 et. seq. (ADEA) and FEHA.

Although a plaintiff need not plead facts to support a prima facie case of discrimination, he or she does need to provide a short and plain statement of the claim showing that the pleader is entitled to relief pursuant to Fed. Rule Civ. Proc. 8(a)(2). Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 514 (2002). The Supreme Court has held that this standard is met in a race and age discrimination case where a plaintiff "detailed the events leading to his termination, provided relevant dates, and provided the ages and nationalities of at least some of the relevant persons involved with his termination." Id.

Here, Plaintiff alleges in conclusory fashion that Defendant extended his leave and refused to reinstate him "because he is not an Anglo-American" and "because he is over 40 years old." (FAC 31, 39) Plaintiff's FAC describes the events surrounding his medical leave of absence and Solar's subsequent refusal to reinstate him. But aside from alleging his status as a minority over the age of 40, Plaintiff has not plead any other facts supporting his characterization of Defendant's actions as age and/or race discrimination. The Court finds

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[1] The Court further rejects Defendant's argument that the employer did in fact provide a reasonable accommodation by providing Plaintiff with a leave of absence even though the employer did not allow Plaintiff to return to work. An accommodation by definition is a change or adjustment which allows disabled individuals to perform their job. A leave of absence does not allow disabled persons to perform their job if they are not allowed to return to work from their leave of absence. In the present circumstances, a leave of absence without a corresponding right to return to work is not an accommodation but rather a delayed termination.

that Plaintiff's claims of age and race discrimination are wholly unsupported by factual allegations and do not meet the minimum requirements set forth in Swierkiewicz. 534 U.S. at 514. The Court therefore grants Defendant's motion to dismiss with regard to these claims.

Plaintiff has leave to amend his complaint. If he chooses to pursue these causes of action for age and race discrimination, Plaintiff should include factual allegations that show that he was treated badly because of his race or age, such as, but not limited to, details regarding Plaintiff's own age and race/national origin and the ages and race/ national origins of his supervisors and any relevant co-workers or employees who replaced Plaintiff in his position.

4. Sexual Harrassment Claims

Plaintiff alleges that his supervisor Mullen sexually harassed him by targeting him as a poor performer, making him work on the shop floor, forcing him to attend training which he did not need, and giving him false performance reviews. (FAC 1, 8)

Sexual harassment claims usually take the form of either (1) quid pro quo claims where an employer conditions a benefit of employment upon acquiescence to sexual advances; or (2) hostile work environment claims where an employer subjects the employee to unwelcome conduct amounting to hostile working conditions. Meritor Savings Bank v. Vinson, 477 U.S. 57, 65-69 (1986); Fisher v. San Pedro Peninsula Hospital, 214 Cal. App. 3d 590, 609-611 (1989). Regardless of the theory Plaintiff proceeds under, the crux of a sexual harassment claim is "whether members of one sex are exposed to disadvantageous terms and conditions of employment to which members of the other sex are not exposed." Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 81 (1998); see EEOC v. National Ed. Ass'n, Alaska, 422 F.3d 840, 842 (9th Cir. 2005)(a court must look to the "differences in the harassment suffered by female and male employees.").

Plaintiff fails to state a claim for sexual harassment because he alleges no facts in support of a claim that Mullen's mistreatment was motivated by his gender or that he was subject to working conditions less favorable to his gender. Plaintiff neither alleges that Mullen sought sexual favors from him, harassed him because he refused sexual advances from

Mullen, nor that Mullen mistreated him based on his gender or other gender-related qualities. To the contrary, Plaintiff himself alleges that Mullen targeted Plaintiff to prove to her superiors that she was proactive about poor performers in her department and that she chose to target Plaintiff because he was known as a submissive guy. (FAC 3, 4, Ex. D) Because Plaintiff's allegations do not support, and in fact are inconsistent with, a claim that Plaintiff was harassed *because* of his gender, the Court grants Defendant's motion to dismiss the sexual harassment claim. If Plaintiff continues to believe that he was subject to mistreatment by Mullen based on his sex, he may amend his complaint to include such allegations and any supporting facts.

5. Plaintiff's Motion To Quash Further Motions

Plaintiff moves to quash further motions to dismiss on the grounds that Defendant's motions to dismiss (1) contain "twisted facts and falsities"; and (2) are brought in bad faith for the purpose of delaying this action and draining Plaintiff's finances.

The Court has reviewed Defendant's motions filed to date and concludes that they were properly brought in exercise of Defendant's rights under Rule 12 of the Federal Rules of Civil Procedure. In response to Defendant's first motion to dismiss, the Court made no finding as to the viability of the claims in Plaintiff's original complaint but rather ordered Plaintiff to provide a more definite statement of his claims. After Plaintiff filed his FAC, Defendant brought another motion to dismiss challenging the sufficiency of Plaintiff's pleadings in the FAC. The Court notes that bringing more than one motion to dismiss is not unusual and finds no evidence of bad faith or dilatory tactics in Defendant's actions detailed above. The Court also finds that Defendant's arguments, even though the Court disagreed with some of them, were not frivolous or malicious but rather an exercise of zealous advocacy on behalf of the client. Moreover, the Court notes that Defendant's motions to dismiss were appropriately limited to argument based on the content of Plaintiff's own pleadings and attached exhibits. In moving to dismiss, Defendant made no inappropriate attempt to introduce extraneous information outside the pleadings to sway the court. The

Court therefore denies Plaintiff's motion to quash further motions to dismiss.

6. Plaintiff's Motion To Disbar Defense Counsel and "Qualify" Him As a Co-Defendant

Plaintiff further requests that the Court disbar Defendant's attorney, William Whelan (defense counsel) and add him as an individual defendant to the lawsuit. Plaintiff bases his request on the grounds that defense counsel acted as follows: (1) introduced twisted facts and falsities in Defendant's Motions to Dismiss; (2) disparaged Plaintiff's race, national origin or medical conditions; (3) knowingly harassed Plaintiff and plotted to drain his resources; (4) served motions and pleadings on Plaintiff that limit his ability to respond; and (5) engaged in excessive and abusive discovery and delay tactics. Plaintiff cites as one example the fact that defense counsel subpoenaed documents and allegedly colluded with Aptara, the company responsible for copying the documents, to charge Plaintiff $42.22 per page for photocopying.

The Court has reviewed all the briefing filed by Defendant to date and also the attached letter and subpoenas issued by defense counsel and finds no evidence of misleading or false facts, disparaging comments , harassing or dilatory tactics or abusive discovery. The Court sympathizes with Plaintiff's frustration and understands that as a pro se litigant, Plaintiff may often feel confused, overwhelmed and/or financially drained. On the present record before the Court, however, it appears that Plaintiff's frustration and limited ability to respond is the result of the inherent difficulty in prosecuting an action without the aid of an attorney as opposed to the result of any inappropriate and harassing behavior on the part of defense counsel. The Court therefore finds that there are no grounds to disbar defense counsel[2] or to add him as a individual defendant to the suit.

The Court speculates that Plaintiff's allegation regarding the excessive cost of photocopying the subpoenaed documents is the result of a miscommunication between

[2] The Court agrees with Defendant that it is questionable whether the Court has the authority to disbar defense counsel. Even assuming that it has the authority, the Court finds that it would not do so because there is no evidence of unethical or inappropriate conduct on the part of defense counsel.

Plaintiff and Aptara. The Court requests that the defense counsel write Plaintiff a brief letter explaining the copying costs of the subpoenaed documents.

CONCLUSION

For the reasons set forth above, the Court GRANTS IN PART AND DENIES IN PART Defendant's motion to dismiss. [Doc. No. 10] Plaintiff's causes of action for race discrimination, age discrimination and sexual harassment are dismissed with leave to amend. The Court DENIES Defendant's motion for a more definite statement with regard to the remaining claims. [Doc. No. 10] The Court DENIES Plaintiff's motions to quash further motions, disbar defense counsel and add him as an additional defendant. [Doc. No. 16] Because the Court finds no sanctionable conduct, the Court further DENIES Plaintiff's amended motion for sanctions. [Doc. No. 19]

Plaintiff is advised that any amended complaint must attach proof of exhaustion of Plaintiff's administrative remedies. Although the Court is aware that Plaintiff attached his EEOC right to sue letter to his original complaint, each pleading must be complete in itself without reference to the superseded pleading. See Civil Local Rule 15.1. Plaintiff is further advised to separately plead his claims pursuant to Federal Rule of Civil Procedure 10(b) to facilitate the clear presentation of his allegations, i.e., Plaintiff should have separate sections for each of his claims and, under each section, list all the facts supporting that claim. Any second amended complaint must be filed and served on or before January 25, 2008. Defendant's time to answer is extended to February 8, 2008.

IT IS SO ORDERED.

DATED: December 18, 2007

Honorable Barry Ted Moskowitz
United States District Judge